DOCUMENT RESUME

ED 281 244 CS 210 481

AUTHOR Gleason, Timothy W.
TITLE The Fact Is, It's an Opinion: The Fact/Opinion Distinction in Fair Comment.
PUB DATE Aug 87
NOTE 39p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (70th, San Antonio, TX, August 1-4, 1987).
PUB TYPE Viewpoints (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Communication Research; *Constitutional Law; Court Judges; *Court Litigation; *Freedom of Speech; *Language Usage; Laws; *Legal Problems; Opinions
IDENTIFIERS *Fact Opinion Distinction; Fair Comment; First Amendment; Legal Precedents; *Libel; Press Law

ABSTRACT

The establishment of First Amendment protection for statements of opinion has extended the category of protected expression, but judicially created tests for distinguishing fact from opinion provide limited guidance for judges and place little constraint on judicial interpretation of language. In writing the Supreme Court's majority opinion in "Gertz vs. Welch," Justice Powell rejected the concept of the existence of a "false idea," asserting an absolute constitutional protection for ideas or opinions. The combination of this assertion and the constitutional requirement that judges pay attention to the context in which language is used has become a powerful precedent for the expansion of the types of expression protected under the defense of fair comment. However, an overview of the legal history of the fact/opinion distinction within the constitutional law of fair comment shows that existing tests do not ensure predictable, consistent protection either for freedom of the press or for reputation. While it would be unrealistic and unwise to expect judges to adopt the perspectives or methods of communication research, the law of libel is based upon judicial assumptions about communication, and an understanding of the questions raised by judicial interpretation of language would help explain the failure of existing fact/opinion tests. Judicial appreciation of a fine turn of phrase or a well-crafted sentence is too fragile a thread for protection of freedom of the press. The case law concerning the fact/opinion distinction is loaded with uninformed judicial assumptions about the way in which audiences interpret text and receive messages, and answers to communication questions would inform and clarify the legal question. (NKA)

**********
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
**********

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☒ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

ED281244

# THE FACT IS, ITS AN OPINION:
## The Fact/Opinion Distinction In Fair Comment

Timothy W. Gleason

Department of Communication
University of Utah
Salt Lake City, UT 84112

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Timothy W. Gleason

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

CS210481

Paper presented in Research Paper Session of the Law Division of AEJMC, the 1987 AEJMC Convention, San Antonio, Texas, August 1987.

# THE FACT IS, IT'S AN OPINION:
# THE FACT/OPINION DISTINCTION IN FAIR COMMENT

## INTRODUCTION

In June of 1983, Ellen Goodman, a nationally syndicated columnist for the Boston Globe, wrote an editorial column full of outrage over the verdict in the trial of the "Holbrook 5." They were charged with the rape of a 39-year old woman and for malicious damage to the woman's car. Goodman expressed her anger over the inherent injustice she found in a legal system that reached a not guilty verdict on the rape charge but convicted on the charge of malicious damage.

> What is agreed upon by everyone is that the men took turns. While one was jumping on her, the others were jumping on the car. At the end, the bruised auto was rolled over the embankment. The bruised woman was left naked in the January night....
> On June 17, they were found innocent of damaging the woman but---hosanna and pass the scales of justice---guilty of damaging the car.[1]

Alexander Aldoupolis, one of the "Holbrook 5", brought a libel action against Goodman and the Globe. The defendants claimed the column was protected opinion under the defense of fair comment. In Aldoupolis v. Globe Newspapers[2] the Massachusetts Supreme Judicial Court held that column, including the statement "What is agreed upon by everyone is that the men took turns. While one was jumping on her the others were jumping on the car," is a constitutionally protected statement of opinion when the language is "examin[ed] in its totality in the context in which it was uttered or published."[3]

Aldoupolis v. Globe Newspapers is an example of a dramatic and important trend in the law of libel. In recent years courts have expanded the category of protected opinion under the defense of fair comment. Statements, such as the seemingly factual statement in Ellen Goodman's column, which would have at the very

least provided grounds for a trial under the common law of fair comment, are now, as a result of the introduction of constitutional protection for opinion statements into the law of fair comment, given First Amendment protection. Litigation based on such statements frequently ends in dismissals or summary judgments for defendants.[4]

But the development of constitutional protection of opinion and the integration of that protection into the common law-based defense of fair comment have not been a neat or satisfactory process. While the principle is well established that "it is in the fact versus opinion realm of defamation law that constitutional concerns intrude into what is otherwise a cause of action governed by state law,"[5] judges continue to struggle to develop legal criteria for distinguishing fact from opinion.

The consequence of judicial failure to establish a satisfactory method for distinguishing fact from opinion is expanded protection for statements of opinion built on a weak and flawed foundation. While the Massachusetts Supreme Judicial Court held that Ellen Goodman's column was protected opinion, a different court using the same criteria for distinguishing fact from opinion easily could have interpreted the column as containing unprotected statements of fact. Thus, the good news is that the establishment of First Amendment protection for statements of opinion has extended the category of protected expression, but the bad news is that the judicially created tests for distinguishing fact from opinion provide limited guidance for judges and place little constraint on judicial interpretation of language.

The expansion of the opinion category is a result of two related developments in the law of libel following the constitutionalization of libel law in New York Times v.

Sullivan.[6] The first is the U.S. Supreme Court's raising "the role of context to constitutional status."[7] In Greenbelt Cooperative Publishing v. Bresler[8], a 1970 decision concerning a charge of "blackmail,"[9] the Court said language must be interpreted within "the context in which it was used..."[10] Judges can no longer rely on strained dictionary-derived interpretations of the meaning of words, but are required to take into account the conditions under which the language is used and to recognize "rhetorical hyperbole"[11] and other literary and rhetorical devices which influence audience interpretation of language.

The second development is dictum found in Justice Powell's majority opinion in Gertz v. Welch.[12]

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.[13]

The Gertz case is an important case in libel law for several reasons,[14] but the case was not argued on or decided on fair comment grounds. However, as Judge Henry J. Friendly observed in 1980, Powell's dictum "has become the opening salvo in all arguments for protection from defamation actions on the grounds of opinion, even though the case did not remotely concern the question."[15]

The combination of Justice Powell's assertion of an absolute constitutional protection for ideas or opinions--he used the words interchangeably--and the constitutional requirement that judges pay attention to the context in which language is used has become a powerful precedent for the expansion of the types of expression protected under the defense of fair comment. From the mid-1970s to the present, courts have attempted to develop criteria that enable judges to distinguish between statements of fact and

statements of opinion. Among the most recent and most important cases in this effort are Ollman v Evans,[16] Mr. Chow v. Ste. Azur,[17] and Janklow v. Newsweek.[18]

While the results of the majority of recent fair comment cases are favorable to free press interests, that is, the courts used the fact/opinion distinction in fair comment to find in favor of media defendants, the tests developed in the cases noted above and other recent decisions raise serious concerns.

Stated in the broadest terms the constitutionalization of fair comment addresses the always difficult question of the meaning of freedom of the press. Constitutional interpretation is a process of balancing competing interests and "line drawing."[19] In the fair comment cases, judges are attempting to determine where to draw the line between protected opinion and unprotected facts as a means of determining the extent of constitutional protection of freedom of the press.

If the fact/opinion distinction is viewed as nothing more than a legal tool for balancing interests and drawing lines, then the questions open for discussion concern the utility and effectiveness of the distinguishing fact from opinion in balancing the interests of freedom of the press and individual reputation within the law of libel. The case law examined in this paper shows that the existing fact/opinion tests do not ensure predictable, consistent protection either for freedom of the press or for reputation.

The law of libel is based upon judicial assumptions about communication.[20] Underlying the fact/opinion distinction are judicial assumptions about the manner in which texts[21] are interpreted, the effect of two categories of expression--fact

and opinion--on an audience's beliefs about an individual's reputation, and the value of those categories of expression in public debate. These communication assumptions are, for the most part, unexamined and unchallenged in the legal literature.

This paper is the first step in a larger research project. Its purpose is to provide an overview of the legal history of the fact/opinion distinction within the constitutional law of fair comment. The next step in this project will be an examination of the fact/opinion distinction from a communication perspective.

While it would be unrealistic and unwise to expect judges to adopt the perspectives or methods of communication research, one of the primary assumptions of this paper and the larger research project of which it is a part is that an understanding of the communications questions raised by judicial interpretation of language will help explain the failure of the existing fact/opinion tests.

Several questions are addressed:

(1) Is the fact/opinion distinction a valid distinction or is it little more than a useful jurisprudential device?

(2) Are the criteria developed by the courts for distinguishing fact from opinion useful? Do they provide judges with the means to make meaningful distinctions?

(3) Do the criteria constrain the use of judicial discretion or are judges free to use the criteria to justify personal interpretations of language as fact or opinion?

(4) Are the tests conclusionary devices, or do they provide uniform and predictable results?

This paper addresses these questions by briefly sketching out the history of the common law defense of fair comment, tracing the development of the constitutional law of fair comment and

examining recent efforts to establish comprehensive tests for distinguishing fact from opinion.

The discussion of the legal development of constitutional standards for the fact/opinion distinction shows that the tests do not provide useful criteria for distinguishing fact from opinion. The failure of the developed tests is due, in part, to the lack of judicial recognition of the communication questions inherent in the fact/opinion distinction. In the efforts to develop constitutional protection for opinion, courts have gathered together assorted common law criteria for distinguishing fact from opinion. But the "comprehensive" use of criteria that provided uncertain protection for opinion under the common law has not removed the uncertainty which has historically existed in the common law of fair comment.

## FACT OR OPINION?

### The Fact/Opinion Distinction in the Common Law of Fair Comment

The common law defense of fair comment protects "honest expressions of opinion on matters of legitimate public interest where based upon a true or privileged statement of fact."[22] The defense is well established in the common law, but commentators agree that the defense is "well recognized" but "ill defined."[23]

Much of the confusion surrounding the common law of fair comment is found in judicial analysis of the fact/opinion distinction. However, until recent years little attention was paid to the confusing and mechanistic analysis used to distinguish fact from opinion.[24] In a 1962 law review article, Herbert W. Titus summarized the criticism of the "somewhat nebulous"[25] fact/opinion distinction in the common law.

> Only a cursory glance at the authorities yields the startling realization that the distinction is more often stated than defined and if and when it is defined, that it is often stated in a manner as if the words were self-explanatory.[26]

The distinction is central to the defense. If a statement is held to be a statement of fact, then the defense does not apply. Judges are required to evaluate alleged defamatory statements to determine whether they are capable of defamatory meaning. If language is held to be an opinion and the other requirements of the fair comment defense are fulfilled, then the language is not actionable.[27] Yet, in the common law no satisfactory criteria or method exists for determining the status of statements. Judges relied on "the common law doctrine that words should be interpreted in accordance with their ordinary, natural, and reasonable meaning."[28]

The common law standard allowed judges to evaluate the meaning of language without taking into account the context in which the language appeared. As a result of tortured, narrow interpretation, statements that naturally could be considered the opinion of the speaker within the context of a given situation, were held to be statements of fact. Commonwealth v Canter,[29] is one of the more extreme examples of ignored context. While it is an extreme example, Canter illustrates the importance of context to the interpretation of language and the importance of constraining and informing judicial interpretation of language.

In a criminal libel action brought against Harry Canter, the leader of a group protesting the execution of Nicola Sacco and Bartolomeo Vanzetti, the Supreme Judicial Court of Massachusetts ruled that the words "Fuller--Murderer of Sacco and Vanzetti,"[30] a reference to the Governor of the state, written on a placard carried

in a protest demonstration, constituted a defamatory statement of fact.

> The words...taken in their usual, natural and popular sense and without forced construction, import a charge of the most heinous crime known to the law--willful murder...[31]

The Court's interpretation of the language agreed with a dictionary definition of "murderer,"[32] and with the generally accepted common law rule that accusation of criminal activity is libeleous per se. But within the context of a protest rally over a politically controversial execution, the Court's interpretation bears little relation to the opinion-laden message at issue in the case.

The Free Speech Rationale for the Fact/Opinion Distinction

A minority of states adopted a privilege of fair comment and criticism that ignored the fact/opinion distinction. These states established a privilege which protected good faith discussion of matters of public concern without reference to fact or opinion.[33] However the large majority of states used the fact/opinion distinction to distinguish protected comment and criticism from unprotected factual assertions.

The fact/opinion distinction in the common law is based on judicial assumptions about the value of statements of opinion in public debate. The freedom to express opinions enhances the "marketplace of ideas," but statements of false facts pollute public discussion. Opinion statements cannot be proved true or false, and therefore, individuals must have the freedom to express and evaluate opinions without fear of legal punishment.

On the other hand, the common law argues, factual statements are susceptible to objective proof. Once a statement is proven or is known to be false it no longer has any value in the marketplace.

While this view of fact and opinion was accepted under the common law, little or no attention was paid to the problem of distinguishing fact statements from opinion statements.

The discussions of Oliver Wendell Holmes and William Howard Taft about the fact/opinion distinction in two of the leading cases, Burt v. Advertiser Newspaper Co.[34] and Post Publishing Co. v. Hallam[35] indicate that the differences between fact and opinion were assumed to be self-evident.

Oliver Wendell Holmes, then a judge on the Supreme Judicial Court of Massachusetts, with little elaboration asserted that the "so-called privilege of fair criticism upon matters of public concern" protected "freedom of discussion rather than of statement."[36] Taft, then sitting on the Sixth Circuit Court of Appeals, rejected the defendant's argument for a privilege to protect all good faith "comment and criticism" concerning the acts of public men. Taft agreed that good faith statements of opinion should be privileged, but found no value and a great deal of harm, in a privilege that would protect unproven factual assertions.

> The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation...The privilege should always cease when the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed.[37]

He then quoted with approval Lord Chancellor Herschell's opinion in Davis v Shepstone.[38]

> There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment and criticism...But the distinction cannot be too clearly borne in mind between comment and criticism and allegation of fact...It is one thing to comment upon or criticise, even with severity...and quite another to assert that he has been guilty of particular acts of misconduct."[39]

Libel law argues for the principle that an allegation of specific wrongdoing carries the potential for greater harm to reputation than a statement qualified either explicitly or implicitly as being a statement of one individual's view of another individual. It assumes that audiences give greater weight to statements of verifiable fact than to subjective statements, and that the words, rather than the source of a statement and the context in which it is made, are the determinative factor.

Common experience suggests that legal assumptions about audience interpretations of fact and opinion have little in common with reality. If a close friend whose political knowledge and opinion you respect and agree with says, "I think Ronald Reagan is lying. He knew what Oliver North was doing," you are likely to give greater weight to his opinion, than to President Reagan's assertions that he had no knowledge of North's activities. The determinative factors are the source of the information, the context in which the statement is made, and your predisposition to believe your friend and to question the President's statements--not the "opinion" or "fact" nature of the text. The text will contribute to the audience's interpretation, but it is only one of several factors.

Even if it can be demonstrated that the fact/opinion distinction is valid, the problem of distinguishing the two remains. An example from Gatley on Libel used to illustrate the difference between a statement of fact and a statement of opinion in Cohalan v. New York World-Telegram,[40] a 1939 case in the New York Supreme Court, illustrates the emptiness of the fact/opinion distinction in the common law.

> To write of a man that he is 'a disgrace to human nature' is a defamatory allegation of fact. But if the words were 'He murdered his father and therefore is a disgrace to human nature', the later words appear from context to be merely a comment on the fact.[41]

This example does not illustrate the difference between a statement of fact and a statement of opinion. It merely asserts that the two are different and then illustrates the necessity under the common law to state the "facts" upon which the "opinion" is based. It is arguable that under no circumstances could the statement "disgrace to human nature" be interpreted as a factual statement. The statement is not verifiable and it is not susceptible to objective proof.

In Libel: A Guide to Risk and Responsibilities,[42]

Phelps and Hamilton attempted to illustrate the difference, but succeeded in illustrating the lack of substantive criteria for distinguishing fact from opinion.

> If a television commentator accuses a prominent lawyer of "sheer lunacy," is that an expression of an opinion or of a fact. If the commentator was referring to--or listeners understood him to mean-- a mental derangement, then it it is a statement of fact and a libeleous one. On the other hand, if the commentator is only criticizing the lawyer's idea of barring cameras from the courtroom, then it is an opinion stated like a fact...if the "sheer lunacy" description were preceded with and followed by a discussion of the ideas the lawyer had expressed. Then there would be no mistaking his intent to offer an opinion.[43]

Under the common law the phrase "sheer lunacy" would be treated as a clinical diagnosis of mental derangement unless it was accompanied by statements of the facts which supported the statement. If supporting facts were present, then the phrase becomes a statement of opinion.

The logic behind the "facts stated or known" requirement in the fair comment defense is that the reader will be able to evaluate the validity of the opinion statement if the factual basis for the opinion is available.[44]

However, the facts stated or known requirement does not aid in determining whether a statement is a statement of fact or

opinion. This mechanical method of analysis, in which opinions are separated from facts and then the relation between the two groups of statements is evaluated, assumes a meaningful distinction exists and that the defamatory content of a given text is determined by the presence of fact and opinion statements.

The examples "disgrace to human nature" and "sheer lunacy" demonstrate the inadequacy of the fact/opinion distinction under the common law. Both statements are opinion-laden and it is difficult, if not impossible, to construct a sentence in which either phrase reasonably could be interpreted as a statement of fact. Standing alone or surrounded by statements of verifiable fact, it is hard to imagine a common, ordinary reader interpreting either phrase as a statement of fact. Yet, under the common law, either statement could be interpreted as such.

The Constitutionalization of The Fact/Opinion Distinction

Courts began to address the "inherent insubstantiality"[45] of the fact/opinion distinction under the common law following the constitutionalization of libel law in New York Times v. Sullivan.[46]

In attempting to resolve the inherent problems in the common law fact/opinion distinction and to create a constitutional standard for distinguishing fact from opinion, judges addressed two related questions: (1) What is the inherent meaning of the text? (2) How will (or should) the audience interpret the text? These are communication questions but judges have either not addressed the questions or have accepted the common law assumptions about audience interpretation.

Courts used a two-pronged approach to the fact/opinion

distinction. They examined the nature of the language used and considered the context in which the language appeared.

In the first fair comment case to reach the Supreme Court following New York Times v. Sullivan, the Court held that language must be interpreted within the context in which it was expressed. In Greenbelt Cooperative Publishing Association v. Bresler[47], the Court ruled that the word "blackmail" was protected opinion. The Court said that in the context of a heated debate over a government land use planning issue "blackmail" was "rhetorical hyperbole," not an assertion of fact:

> [In this context it was] simply impossible to believe that a reader who reached the word "blackmail"...would not have understood exactly what was meant....No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.[48]

The criterion of context and the category of rhetorical hyperbole were reinforced and expanded upon in National Association of Letter Carriers v. Austin.[49] During a postal workers' strike, a union newsletter contained a "List of Scabs" and Jack London's definition of a scab:

> The scab sells his birthright, country, his wife, his children, and his fellowmen for an unfulfilled promise from his employer.
>
> Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family, and his class.[50]

Justice Thurgood Marshall noted the volatile climate of labor disputes and asserted that the audience expected to hear opinion-laden statements in such a climate.[51] And the Court said that "traitor" was used "in a loose, figurative sense to demonstrate

the unions' strong disagreement with the views of those workers who oppose unionization."[52]

Greenbelt and Letter Carriers established context as a criterion and "rhetorical hyperbole" as a category of protected opinion. Courts must examine language within its context, that is, the court must take into account the expectations of the audience within a given social or political situation. If the language is used in a "loose, figurative sense" within a context in which the audience expects to hear opinion statements, it is constitutionally protected "rhetorical hyperbole."

On the same day that the Court ruled in Letter Carriers it also handed down its decision in Gertz v Welch. While the Court had begun to develop constitutional standards for fair comment in Greenbelt and Letter Carriers, Justice Powell's dictum in Gertz that "Under the First Amendment there is no such thing as a false idea," provided strong impetus for the development of constitutional standards for the protection of opinion. As interpreted by lower federal courts and state courts, the constitutionalization of fair comment required absolute protection for statements of pure opinion.[53] Efforts to establish constitutional protection for opinion resulted in a confusing array of criteria.

In Gregory v McDonnell Douglas Corp,[54] the California Supreme Court held that the First Amendment required that language be interpreted "in light of the nature and content of the communication taken as a whole."[55] In examining statements challenging the motives of union officers involved in

negotiations, the Court found that within the context of a labor dispute "charges...of the kind typically generated in the 'economic give-and-take' of a spirited labor dispute"[56] which were "cautiously phrased in terms of apparency"[57] constituted protected opinion.

In Buckley v. Littell[58] the Second Circuit Court of Appeals considered the fact/opinion distinction. William F. Buckley brought suit against the author of Wild Tongues, a book that called Buckely a "fellow traveler" and a "fascist," and said "Like Westbrook Pegler, who lied day after day...Buckley could be taken into court...for his lies."[59]

The court expanded context beyond labor disputes to include the "context of political, social, or philosophical debate." It also examined the nature of the publication--the book was, the court said, a "polemical tract."[60] And, the court considered the "imprecision" of the language.[61] Based on these criteria, the court found that "fellow traveler" and "fascism" were statements of opinion because of the "tremendous imprecision of the meaning and usage of these terms,"[62] but the assertion that Buckley was a liar was a "factual assertion relating to Buckley's journalistic integrity."[63]

Buckley is a disturbing decision because it suggests that in spite of judicial recognition of the need to examine the context in which language is used, the use of context does not remove vagueness and unpredictability of the fact/opinion distinction. The court discussed context but its decision turns on the precision of the language, not the context. Within the context of a polemical tract in a heated political debate, the

charge that Buckley, "like Westbrook Pegler...lied day after day,"[64] is open to interpretation as rhetorical hyperbole. Is it a reasonable interpretation to read that statement as a factual charge? Perhaps, it is if the statement appears in a news report or a formal legal document, but the interpretation is less convincing when the statement appears in a polemical tract.

In Avins v. White,[65] the First Circuit Court of Appeals relied on interpretation of the nature of the language without reference to context. The former Dean of the Delaware Law School filed a libel action based on the following statements contained in an accreditation report:

> The most important deficiency is an intangible one; there is an academic ennui that pervades the institution. The intellectual spark is missing in the faculty and the students (emphasis added).[66]

The Court said the phrases "academic ennui or the lack of intellectual spark connote to us no more than a subjective judgment of the educational atmosphere prevailing"[67] in the law school. Clearly such statements made in casual conversation or an informal letter would be statements of opinion, but does the context of the statements--a formal report recommending denial of accreditation--change the interpretation? The Court did not address the question.

The Second Circuit returned to the fact/opinion distinction in Hotchner v. Castillo-Puche.[68] Rather than relying on the precision of language criterion the Court held that "An assertion that cannot be proven true or false cannot be held libelous."[69]

This standard is a subset of the precision standard the Second Circuit used in Buckley. The verifiability of language is going to depend upon the Court's interpretation of the precision

of the language. If, as the Court did in Buckley, "liar" is interpreted as a statement of fact, then it is verifiable. The defendant will be able to produce either evidence of the lies told by the plaintiff or the plaintiff will produce evidence showing a lack of lies and a reputation for veracity. But if the Court interprets "liar" as an opinion-laden figure of speech, then the language is not subject to verifiability--it's an opinion.

"Liar" was held to be an opinion statement in Edwards v. National Audubon Society.[70] A letter to the editor concerning a controversy over the use of the pesticide DDT and the use of the Society's statistical information said, in part, "nor do we like to call people liars, but those who have most consistently misused our data..."[71]

The Second Circuit distinguished "liar" from "paid liar."[72] To call someone a liar, the Court said, was to "merely express the opinion that anyone who persisted in misusing Audubon statistics after being forewarned could not be intellectually honest;"[73] however, to state that the plaintiff was a "paid liar" would be a statement of fact. The distinction is based on the verifiability of the charge. The fact that the plaintiff had been paid could be established, but the charge that he lied would be harder to prove or disprove.

In National Association of Government Employees v. Central Broadcasting Corp[74] the Massachusetts Supreme Judicial Court held that a town official's characterization of the action of a police union in police contract negotiations constituted an "inroad of communism" was "too amorphous a characterization" to constitute a statement of fact.[75] The plaintiff's claim that it was a

defamatory fact "becomes threadbare when setting and meaning... are explored."[76]

While it is easy to agree with the Court's finding that within the context of a labor negotiation the charge of communism was not intended as a statement of fact and therefore could not be proved true or false, the term "communism" is open to either interpretation. The context in which the word is used will determine the meaning of the word.

When context is not the determinative factor in distinguishing fact from opinion, the results are not predictable. National Associationof Government Employees and Buckley both concerned charges of affiliation with political groups and beliefs generally disfavored in the United States. In both cases, the courts held that the charges were opinion statements, yet in Gertz, the charges published in a avowed right-wing publication that Elmer Gertz was a "Leninist," and "a Communist-fronter" were interpreted as statements of fact.[77]

Burns v. Denver Post[78] introduced another variation of verifiability into the mix. It relied on the verifiability standard but added the criterion of certainty.

Jack Burns, a sergeant assigned to the Denver Police Department bomb squad, lost his sight and the use of his right arm while on the job. In two stories published in the Denver Post several months after the accident, Burns talked about the accident and the breakup of his marriage.

> 'My wife divorced me after the accident,' Burns explained. 'That was more traumatic than the loss of vision or the hand or anything. I was extremely bitter.'[79]

In a second article, he said:

> 'I'm not bitter about the accident, but the thing that tore me up was my wife divorcing me. She just couldn't live with a blind man.'[80]

Burn's ex-wife brought suit. A Colorado District Court granted the defendant's motion for summary judgment. The court said "the quotation[s are] incapable of bearing a defamatory meaning. The facts upon which the opinion is based are both stated and true."[81]

The Colorado Court of Appeals affirmed, but it articulated a different standard for determining truth or falsity and relied on the speculative nature of the statements:

> There is no way Burn's opinion as to his ex-wife's motivation in divorcing him can be proved true or false.... Once a court needs to speculate concerning the meaning a statement purports to convey...we enter the area of opinion as opposed to factual assertion.[82]

In a dissenting opinion, Judge Ruland made a counter-assertion.

> In my view, no speculation is required to determine the meaning of the quoted material. Taken in the proper context, Sergeant Burn's remarks are not limited to mere opinion as to why Ms. Burns divorced her husband. These remarks also clearly describe what she did, namely Ms. Burns DESERTED the sargent...an act of 'the basest ingratitude...deserving the contempt of all right-minded people.'[83]

The critical phrases in the dissent are "In my view" and "taken in the proper context." The verifiability standard depends on the initial evaluation of the precision of the language and the reader's interpretation of the words. While it enables judges to make fact/opinion distinctions, verifiability is dependent upon the initial interpretation of the language. As Burns, illustrates, the assertion that a particular statement is a statement of opinion provides little support when an equally valid interpretation of the statement as fact is asserted.

Rinaldi v. Holt, Rinehart[84] and Cianci v. New Times[85] relied on the two-pronged analysis of context and the nature of the language but the courts attempted to refine the criteria. In Rinaldi the New York Court of Appeals[86] defined context as "the

ordinary context of the entire article."[87] It found that the phrases "probably corrupt" and "suspiciously lenient" in an article by Jack Newfield about New York Supreme Court Judge Dominic S. Rinaldi were statements of fact because, the Court said, "These words were not used in a loose, figurative sense...The ordinary and average reader would likely understand the use of these words in the context of the entire article as meaning the plaintiff had committed illegal acts..."[88] However, the Court held that "To state that a judge is 'incompetent' is to express an opinion regarding the judge's performance in office."[89]

The Cianci court noted that language must be interpreted "in the context of the entire article and words taken as they are commonly understood."[90] But the Second Circuit focused on the nature of the language:

> [W]hen an 'opinion' is something more than a generally derogatory remark but is laden with factual content, such as charging the commission of serious crimes, the First Amendment confers no absolute immunity (emphasis added).[91]

Beginning with Greenbelt and Letter Carriers courts attempted to define the meaning of constitutional protection of opinion through the use of a two-pronged analysis which examined context and the nature of the language. But the results were inconsistent. Some courts relied on an ill-defined criterion of context which referred to everything from the article in which a statement appeared to the social or political environment, others focused on the precision or verifiability or hyperbolic nature of the language. But the weight of the case law suggests that while courts discussed the context in which the language appeared, few courts used context as a determinative factor.

A Comprehensive Contextual Analysis

Information Control Corp. v. Genesis One Computer Corp.[92]

provided a fact/opinion test which incorporated all of the criteria found in earlier constitutional fair comment cases. The case was decided "under California law"[93] but it is an important precedent in later First Amendment fair comment cases.

The court said that the finding of fact or opinion "requires that the court examine the statement in its totality in context." The following criteria must be considered under the Information Control standard:

(1) The Court must consider "all the words used, not merely a particular phrase or sentence."

(2) It must give weight to cautionary terms or "terms of apparency"

(3) It must consider all the circumstances surrounding the statement including the medium in which the statement is disseminated and the audience to which it is published.[94]

In the instant case, the Court held that Genesis One Computer's charge in a trade publication that Information Control had filed a meritless lawsuit for the purpose of delaying payments it owed Genesis One was a statement of opinion. The Court placed strong emphasis on the context of the charge: The defendant's news release was "cautiously phrased as representing 'the opinion of Genesis management,'" published in a trade publication whose audience "would be expected to be aware of the nature of the litigation between the parties and the responses it would provoke," and made "in the early weeks of a commercial litigation which promised to be hard fought."[95]

Information Control represents an effort to move away from a primary focus on the inherent meaning of the language used to a method of analysis which focused on the effect of context on interpretation of language. In short, the Ninth Circuit said the question is not what does language mean, but rather, how would the audience interpret language in this context?

In recent years three other federal Courts of Appeal have made efforts to fashion comprehensive fact/opinion tests.[96] Ollman v. Evans,[97] Mr. Chow v. Ste. Azur S.A.,[98] and Janklow v. Newsweek,[99] the courts attempted to bring together the various fact/opinion criteria used by earlier courts. The three tests have much in common, but they are not mirror images. While the tests provide some guidance, they have not resolved the confusion about the fact/opinion distinction. As the First Circuit Court of Appeals recently said, "courts that have tried to apply the fact/opinion distinction have discovered that speech does not always break down into such clear categories."[100]

Ollman v. Evans is perhaps the best known and most important of the three decisions. The case concerned a column written by the nationally-syndicated, Washington columnists Rowland Evans and Robert Novak. In "The Marxist Professor's Intentions," the conservative columnists said that political science professor Bertell Ollman was "an outspoken proponent of 'political Marxism.'" In addition the column included the following paragraph:

> Such pamphleteering is hooted at by one political science professor in a major eastern university, whose scholarship and reputation as a liberal are well known. 'Ollman has no status within the profession but is a pure and simple activist,' he said.[101]

A district court granted the defendants' motion for summary judgment, finding the statements to be protected opinion.[102] A panel of the District of Columbia Court of Appeals reversed and remanded.[103] Rehearing the case en banc, the D.C. Circuit reversed the panel decision and affirmed the district court's summary judgment. Judge Starr's plurality opinion identified four criteria for distinguishing fact from opinion:

(1) The court should "analyze the common usage or meaning of the specific language," including evaluation of the precision of the language.

(2) It must determine the degree to which the statements are verifiable.

(3) It should examine the "full context of the statement--the entire article or column." The court should look for the inclusion of cautionary language, the use of language in a "metaphorical, exaggerated or even fantastic sense," and the use of language "laden with factual content."

(4) The Court should also examine the "broader context or setting," which includes factors such as "location on the editorial page," and "the different social conventions or customs inherent in different types of writing."[104]

The Court held that the column was protected opinion. Starr relied on the contextual criteria to find opinion statements.[105] However, collecting assorted criteria used in earlier fair comment cases did not create a determinative fact/opinion test. Judge Patrica M. Wald accepted Starr's test but used it to find that the statement "Ollman has no status within the profession" was a factual statement.[106]

Following the Ollman decision, the Second Circuit fashioned a hybrid fact/opinion test in Mr. Chow. The case involved a restaurant review which included statements such as "The Sweet and sour pork contains more dough than meat," "The green peppers remained frozen on the plate," "The rice was soaking in oil," and "The Peking Duck was made up of only one dish (instead of the traditional three)."[107]

The Second Circuit's test contained four parts:

(1) The context in which the statements are made.

(2) The circumstances surrounding the statement.

(3) Is the language used in a precise literal manner or a loose, hyperbolic, figurative sense?

(4) Are the statements objectively capable of being proved true or false?[108]

The Court found that all the statements were opinion, except the one concerning the serving of Peking Duck. The question of whether Peking Duck contained one or three dishes was a verifiable fact.[109] But for the other challenged statements the context of the article--a restaurant review--was the determinative factor:

> Restaurant reviews are also the well recognized home of opinion and comment...The natural function of the review is to convey the critic's opinion of the restaurant reviewed.[110]

Within the context of a restaurant review, the Court interpreted statements such as "frozen on the plate" and "more dough than meat" as "metaphors, exaggeration and hyperbole."[111]

Janklow is a restatement of Ollman in slightly different language. William Janklow, former governor of South Dakota, sued Newsweek for "Dennis Bank's Last Stand," a report on Janklow's stormy dealings with Native American activist Dennis Banks. The story contained the following statements:

> Along the way, Banks made a dangerous enemy--William Janklow. Their feud started in 1974, when Banks brought charges against Janklow in a tribal court for assault...Eight months later, Janklow, who had won his election despite the messy publicity---<u>was prosecuting Banks</u>. And his case was successful...(emphasis added)[112]

Janklow claimed the article implied that he prosecuted Banks for the purpose of getting revenge. The fact/opinion question centered on the interpretation of "was prosecuting Banks."[113]

A panel of the Eighth Circuit Court of Appeals looked at four factors: (1) "the language used in the article," (2) "the forum in which the statement is made," (3) "the precision of the language," and (4) "cautionary language."[114]

It found that: (1) the language "leaves the impression that it is intended to be factual; (2) The National Affairs Section of Newsweek is a forum in which reader expect to find statements of fact; (3) The statement "was prosecuting Banks" is not a "broad, unfocused or subjective" statement; and (4) The article did not contain "cautionary language." "The statement in the present case," the Court said, "is not an expression of opinion, but rather an assertion of fact."[115]

On rehearing, a majority of the Eighth Circuit en banc reached an entirely different conclusion. Yet the Court used a test containing essentially the same factors. The majority's statement of the fact/opinion criteria included:

(1) The precision and specificity of the disputed statement.

(2) The verifiability of the statement.

(3) The literary context in which the statement was made.

(4) The public context.[116]

The majority found that: (1) The "phrase is not precise...[and] does not necessarily lead to the plaintiff's conclusion"; (2) The statement is "open to several interpretations [and is, therefore]...not verifiable"; (3) The Court noted that not being on an editorial page was not a decisive factor. It said newsmagazines are known for "feisty language," and "readers expect a fair amount of opinion....[It is] a forum where spirited writing is expected"; (4) And looking at the public context, the Court found that "criticism of a state Attorney General now serving as governor" concerning "an issue of public importance, the treatment of Indian people" constituted a matter of great public importance.[117]

Therefore, the challenged statement was protected opinion:

> Because the disputed statement in this case is imprecise, unverifiable, presented in a forum where spirited writing is expected and involves criticism of the motives and intentions of a public official, we affirm the holding of the District Court that it is opinion, protected by the First Amendment.[118]

The contradictory conclusions reached by the Eighth Circuit panel and en banc bring into sharp focus the conclusionary nature of the tests developed to distinguish fact from opinion. In reading the two opinions, it is difficult to believe that the two courts looked at the same text. Clearly, the judges brought to the case extremely different assumptions about the First Amendment interests before the court.

The differing views of the balancing of interests before the court sheds light on the contradictory conclusions reached in the case. The majority opinion in the en banc decision stated the majority's view of the paramount importance of protecting freedom of the press.

> We can agree that this story would have been fairer to Janklow...[but] courts must be slow to intrude into the area of editorial judgment...Under the First Amendment the decision of what to select must always be left to writers and editors...
> Both in establishing the standards by which opinion is distinguished from fact and in measuring a particular statement against those standards we are dealing with First Amendment rights, among the most precious enjoyed by Americans.[119]

This strong support for broad protection of speech explains the majority's broad view of the category of protected opinion. A dissenting opinion from the en banc decision written by the author of the panel's overturned decision articulates a very different view of the First Amendment issue.

> This judicially created limitation on libel actions has, interestingly enough, no apparent relationship to any change that has occurred in either the Constitution or society since the Bill of Rights was ratified in 1791. Libel is still libel. All that has changed is the prevailing judicial perception of where the balance should be struck

> between libel plaintiffs and libel defendants who in our time are frequently large media organizations such as Newsweek. Today's decision tips the balance still further in the media's favor.[120]

Judge Bowman's dissent echos a theme present in the dissents of then Judge Antonia Scalia in the D.C. Circuit's fashioning of a fact/opinion distinction in Ollman[121] and then Associate Justice William Rehnquist's dissent from the Supreme Court's denial of certiorari in the same case.[122] Dissenters from recent fair comment cases assert the tests fashioned by the majorities are nothing more than "judicial semantics"[123] used to justify judicial preferences for unjustified and unexplained expanded protection of defamatory statements.

Are the fact/opinion tests developed over the past decade, and especially the most recent efforts at developing comprehensive tests, little more than conclusionary devices? The evidence supports that claim. How else can we explain the contradictory decisions in Janklow?

And if the maze of criteria developed are little more than conclusionary devices, does the fact/opinion distinction provide adequate protection for freedom of the press? The Massachusetts Supreme Judicial Court's opinion in Aldoupolis v. Globe Newspapers, the case concerning Ellen Goodman's column about the "Holbrook 5" rape trial illustrates the weakness of the distinction.[124]

The Court used the Information Control criteria to analyze the sentence "What is agreed upon by everyone [illegible] that the men took turns. While one was jumping her, the others were jumping the car." The court found that after examining the "totality of context" and the nature of the language that the statement was a statement of opinion.[125] In reaching this conclusion, the Court

engaged in rather sophisticated (for a court) literary criticism. The statement was an opinion statement because of, the Court said:

> evidence from the comparison of an automobile and a woman which Goodman makes throughout the column. She uses the rhetorical device of personification to make an automobile a person and by adroit cadence of parallel sentences compares the favorable treatment of a motor vehicle to the shabby treatment of women in rape cases.[126]

Would the decision have been different if the judge or his law clerk did not have an appreciation for writing style and technique? The question is not facetious--at least it is not intended to be. The fact/opinion tests discussed above do not constrain or determine judicial interpretation of language.

## CONCLUSION

Judicial appreciation of a fine turn of phrase or a well-crafted sentence is too fragile a thread for protection of freedom of the press. The struggle to create a constitutionally acceptable method of determining the difference between statements of fact and statements of opinion have been unsuccessful. If we are to take seriously Justice Powell's assertion that "there is no such thing as a false idea,"[127] then the courts ability to answer the threshold constitutional question under fair comment of whether a statement is a protected opinion or an unprotected fact (which may or may not be actionable depending on other factors) must be either abandoned or redefined.

Developments in other areas of libel law have prompted calls for the abandonment of fair comment. Commentators suggest the constitutional requirement that plaintiffs prove falsity, and the fault standard make the fact/opinion distinction and the fair comment defense redundant and unnecessary.[128] However, the fact/opinion distinction within fair comment continues to be an

important defense which frequently results in dismissal or summary judgment for the defense.[129] A defense that stops libel litigation before it gets to trial or before completion of a trial is an important defense in the current litigation climate.

While placing the burden of proving falsity on the plaintiff removes the burden of proving truth from the defendant, it does not eliminate the fact/opinion distinction. A threshold question in the question of truth or falsity is the nature of the statement. If the statement is not capable of being proved true or false, then it is an opinion. But judges are still faced with interpreting language to determine if a given statement is susceptible to defamatory meaning.[130] Many of the questions of interpretation judges now confront in fair comment must be considered in deciding questions of falsity.

The fact/opinion distinction addresses two different issues: One is in the legal domain, the other is a communications question. The former concerns the meaning of constitutional protection of freedom of the press. While a minority of states have decided to abandon the fact/opinion distinction in favor of a broader protection of freedom of press based on state constitutional protection of public comment and criticism regardless of the fact or opinion nature of statements, it is not realistic to expect the fact/opinion distinction in fair comment or libel law in general to disappear in the near future.

Thus, we are confronted with a communications question. The answers to communication questions would inform and clarify the legal question. The case law concerning the fact/opinion distinction is loaded with uninformed judicial assumptions about the way in which audiences interpret text and receive messages.

While we should not expect judges to bring communications research methods into the courtroom, the question of the meaningfulness of the fact/opinion distinction in defamation law lends itself to research using a variety of communication research perspectives.

NOTES

[1]Aldoupolis v. Globe Newspapers, 500 N.E. 2d. 794, 798 (Mass. 1986).

[2]Ibid.

[3]Ibid., p. 797.

[4]Marc A. Franklin, "Libel and Letters To The Editor," Colorado Law Review 57 (1986) 651, 658.

[5]Catalfo v. Jensen, 13 MLR 2356, (Dt.Ct., NH, 1987)

[6]New York Times v. Sullivan, 376 U.S. 254 (1964).

[7]Marc Franklin, Daniel Bussel, "The Plaintiff's Burden in Defamation," William and Mary Law Review 25 (1984) 825, 830.

[8]Greenbelt Cooperative Publishing v. Bresler, 398 U.S. 6 (1970).

[9]Ibid.

[10]Ibid., p. 13.

[11]Ibid., p. 14.

[12]Gertz v. Welch, 418 U.S. 323 (1974).

[13]Ibid., p. 339.

[14]In Gertz the Supreme Court ruled that private persons as well as public figures and officials must demonstrate some level of fault when suing a media interest for libel.

[15]Cianci v. New Times, 639 F.2d. 54, 61 (2nd. Cir. 1980).

[16]Ollman v. Evans, 750 F.2d. 970 (D.C. Cir. 1984)

[17]Mr. Chow v. Ste. Azur, 759 F.2d. 219 (2nd Cir. 1985)

[18]Janklow v. Newsweek, 788 F.2d. 1300 (8th Cir. 1986)

[19]Henry J. Abraham, Freedom and the Court, 4th ed. (New York: Oxford University Press, 1982) p. 152.

[20]Jeremy Cohen, Albert C. Gunther, "Libel as Communication Phenomena," (Communications and the Law, in press, Oct. 1987).

[21]This paper discusses cases interpreting written language. The question of interepretation is also a problem in interpreting visual and mixed texts. For example, see, Keller v. Miami Herald, 788 F.2d. 711 (11th Cir. 1985) (editorial cartoon), Spelson v. CBS, 757 F.2d. 1291 (7th, 1985) (news broadcast), Brown & Williamson Tobacco Corp. v. Jacobson, 644 F. Supp. 1240 (Ill. 1986) (broadcast editorial), Action Repair v. ABC, 776 F.2d. 143 (7th Cir. 1985), King v. Globe Newspapers, 12 MLR 2361 (Mass. 1986) (editorial cartoon), Polygram Records v. Superior Court, 216 Cal Rptr. 252 (1985) (comedy routine), Buller v. Pulitzer Publishing, 684 S.W. 2d. 473 (Mo. 1984) (editorial cartoon).

[22]Herbert W. Titus, "Statement of Fact Versus Statement of Opinion--A Spurious Dispute in Fair Comment," Vanderbilt Law Review 15 (1962) 1203; Franklin, "The Plaintiff's Burden," p. 872.

[23]Note, Harvard Law Review, 62 (1949) 1207.

[24]In 1962 Titus wrote,"Only one piece of legal writing has attempted to analyze what is meant by the distinction between these two kinds of statements. A student note in 62 Harvard Law Review..." In recent years more attention has been paid to the fact/opinion distinction, see, for example, Franklin, "The Plaintiff's Burden;" Frederick F. Schauer, "Language, Truth And The First Amendment," Virginia Law Review, 64 (1978) 263; Note, "Structuring Defamation Law to Eliminate the Fact-Opinion Determination," Iowa Law Review 71 (1986) 914; Note, "Fact and Opinion After Gertz v Welch, Inc." Rutgers Law Review 34 (1981) 81.

[25]Titus, p. 1205, quoting Harper & James, Torts, 1 (1956) 458.

[26]Titus., p. 1205.

[27]see, Restatement of Torts, sec. 566 (1938) for a detailed discussion of the common law fair comment defense before Gertz v Welch. See, Restatement (second) (1977) and supplements for a discussion of fair comment after Gertz. Also see, Don R. Pember, Mass Media Law 4th ed. (Dubuque: Wm. C. Brown, 1987) 189-196.

[28]Schauer., p. 264.

[29]168 N.E. 790 (1929), discussed in Schauer, p. 263-265.

[30]Ibid.

[31]Ibid.

[32]for example, "murderer n: one who murders; esp one who commits the crime of murder." Webster's New Collegiate Dictionary (Springfield: G. & C. Merriam Co., 1979) 751.

[33]Titus., p. 1204; Franklin, "The Plaintiff's Burden," p. 873

[34]Burt v. Advertiser Newspaper Co., 28 N.E. 1 (Mass. 1891).

[35]Post Publishing v. Hallam, 59 Fed. 530 (6th Cir., 1893).

[36]28 N.E. 1,4 (1891)

[37]59 Fed 530, 540 (1893).

[38]Davis v Shepstone,11 App Cas 187.

[39]59 Fed. 530, 541 (1893).

[40]Cohalan v. New York World-Telegram, 16 N.Y.S.2d. 706 (1939).

[41]Ibid., p.710.

[42]Robert H. Phelps, Douglas Hamilton, Libel: A Guide To Rights, Risks, Responsibilities, (London: Collier Books, 1969).

[43]Ibid., p. 198.

[44]Pember, p. 196.

[45]Franklin, "The Plaintiff's Burden," p. 873.

[46]See, Note, Rutgers Law Review 34 (1981) 81, 91-92, for a discussion of footnote 30 in New York Times v. Sullivan. The note states, in part, "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest statements of opinion based upon privileged, as well as true, statements of fact."

[47]Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6 (1970).

[48]Ibid., p. 14.

[49]National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974).

[50]418 U.S. 264, 268 (1974).

[51]Ibid., p. 272.

[52]Ibid., p. 284.

[53]Restatement (second), sec. 566 (1977).

[54]Gregory v McDonnell Douglas Corp., 552 P2d 425 (Ca. 1976).

[55]Ibid., p. 428.

[56]Ibid., p. 429

[57]Ibid.

[58]Buckley v. Littell, 539 F.2d. 882 (2nd Cir. 1976).

[59]Ibid., p. 884-85.

[60]Ibid., p. 894.

[61]Ibid., p. 893.

[62]Ibid.

[63]Ibid., p.895-96.

[64]supra note 58.

[65]Avins v. White, 627 F.2d. 637 (1st Cir. 1980).

[66]Ibid., p. 640.

[67]Ibid., p. 643.

[68]Hotchner v. Castillo-Puche, 551 F.2d. 910 (2nd Cir. 1977).

[69]Ibid., p. 913.

[70]Edwards v. National Audubon Society, 556 F.2d. 113 (2nd Cir. 1977).

[71]Ibid., p. 119.

[72]Ibid., p. 121.

[73]Ibid.

[74]National Association of Government Employees v. Central Broadcasting Corp, 396 N.E. 2d. 996 (Mass. 1979).

[75]Ibid., p. 1001.

[76]Ibid.

[77]418 U.S. 323, 331 (1974), also see Note, Rutgers Law Review 34 (1981) 81, 121.

[78]Burns v. Denver Post, 606 P.2d. 1310 (Colo. 1979). While the focus of the paper is on federal case law, this case is representative of a number of state decisions.

[79]Ibid.

[80]Ibid.

[81]Burns v. Denver Post, 5 MLR 1105 (Colo. 1979)

[82]606 P.2d. 1310, 1311.

[83]Ibid.

[84]Rinaldi v. Holt, Rinehart & Winston, 366 N.E.2d. 1299 (N.Y. 1977).

[85]Cianci v. New Times, 639 F2d 54 (2nd, 1980).

[86]The Court of Appeals is the highest appellate court in the State.

[87]366 N.E.2d. 1299, 1306-07. In defining context the court seems to suggest that the circumstances of publication should be considered. "Based upon the facts stated and public debate provoked by the statements each reader may draw his own conclusions."

[88]Ibid., p. 1307.

[89]Ibid., p. 1306.

[90]639 F.2d. 54, 60 (2nd Cir. 1980).

[91]Ibid., p. 63.

[92]Information Control Corp. v. Genesis One Computer Corp., 611 F.2d. 781 (9th Cir. 1980).

[93]Ibid., p. 783.

[94]Ibid., p. 784.

[95]Ibid.

[96]The three cases discussed are far from the only fact/opinion cases decided in recent years. Both state and federal courts have attempted to deal with the question. Additional federal decisions of note not mentioned elsewhere in this paper include: Silvester v. ABC, F. Supp. (S.D. Fla. 1986), Rizzuto v. Nexxus, 641 F.Supp 473 (S.D.N.Y. 1986), Saenz v. Playboy, F.Supp. (N.D. Ill. 1987), Presidio Enterprises v. Warner Bros. Distributing, 782 F.2d. 674 (1st Cir. 1986), Trump v. Chicago Tribune, 616 F.Supp. 1434 (D.C. N.Y. 1985), Woods v. Eveansville Press, 791 F.2d. 480 (7th Cir. 1986), In re Yagman, 13 MLR 1545 (9th, 1986)

State court decisions include: Cole v. Westinghouse Broadcasting, 435 N.E.2d. 1021 (Mass. 1982), El Paso Times v. Kerr, 706 S.W.2d 797 (Tx. 1986), Nash v. Keene Publishing, 12 MLR 1025 (N.H. 1985), Camer v. Seattle Post-Intelligencer, 13 MLR 1481 (WA. 1986), Marchiondo v. Brown, 649 P.2d. 462 (N.M. 1982), Miskovsky v. Oklahoma Publishing, 654 P.2d. 587 (Ok. 1982)Dunlap v. Wayne, 716 P.2d. 842 (Wa. 1986), Henry v. Halliburton, 690 S.W.2d. 775 (Mo. 1985), Fleming v. Benzaquin, 454 N.E.2d. 95 (Mass. 1983), Riley v. Moyed, 13 MLR 1420 (De. 1986), Scott v. News-Herald, 496 N.E.2d. 699 (Ohio 1986), Baker v. Herald Examiner, 721 P.2d. 87 (Cal. 1986), Steinhilber v. Alphonse, 501 N.E.2d. 550 (N.Y. 1986).

[97]Ollman v. Evans, 750 F.2d. 970 (1984)

[98]Mr. Chow v. Ste. Azur S.A., 759 F.2d. 219 (2nd Cir., 1985).

[99]Janklow v. Newsweek, 788 F.2d. 1300 (8th Cir. 1986).

[100]McCabe v. Rattiner, 814 F.2d 839 (1st Cir. 1987).

[101]750 F.2d. 970, 973 (1984)

[102]479 F. Supp. 292 (D.D.C. 1979).

[103]713 F.2d. 838 (D.C. Cir. 1983)

[104]750 F.2d. 970, 979-84 (1984).

[105]Note, Iowa Law Review 71 (1986) 913, 926.

[106]750 F.2d. 970, 1032.

[107]759 F.2d. 219, 221-22 (2nd Cir. 1985).

[108]Kelly v Schmidberger, 806 F.2d. 44, 47 (2nd. Cir. 1986).

[109]759 F.2d. 219, 226-27 (2nd Cir. 1985).

[110]Ibid., p. 227.

[111]Ibid., p. 229.

[112]788 F.2d. 1300, 1303 (8th Cir. 1986).

[113]Ibid.

[114]759 F.2d. 644 (1985).

[115]Ibid., p. 651-52.

[116]788 F.2d. 1300, 1302-03 (8th Cir. 1986).

[117]Ibid., p. 1303-05.

[118]Ibid., p. 1305.

[119]Ibid., p. 1306.

[120]Ibid., p. 1306-07.

[121]750 F.2d. 970, 1032.

[122]86 L. Ed. 2d. 278,280 (1985).

[123]788 F.2d. 1300, 1307 (1986).

[124]500 N.E. 2d. 794 (Mass. 1986).

[125]Ibid., p. 797.

[126]Ibid.



[127]Gertz v. Welch, 418 U.S. 323 (1974).

[128]supra note 6, 23.

[129]supra note 23.

[130]Restatement (second) sec. 566 (1977).